IN THE MISSOURI SUPREME COURT
EN BANC

STATE OF MISSOURI ex rel. DAVID M. NOTHUM AND GLENETTE NOTHUM Relators, vs. HONORABLE JOSEPH L. WALSH III St Louis County Circuit Court Judge Respondent.	)	No. SC92268

An Original Proceeding in Prohibition

Brief of Relators David M. Nothum and Glenette Nothum

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Jurisdictional Statement

This action is an original proceeding in prohibition against Respondent, the Honorable Joseph L. Walsh, III, St. Louis County Judge, Division 17. The Missouri Court of Appeals for the Eastern District entered its preliminary order in prohibition on November 3, 2011, and stated on January 10, 2012 that it would make that preliminary order absolute. However, the Court found that the issues raised are of general importance and therefore, pursuant to Missouri Supreme Court Rule 83.02, the Court ordered transfer to this Court.

This Court has jurisdiction of this proceeding pursuant to Art. V, § 10 of the Missouri Constitution because of the general interest or importance of the questions involved in the case.

A writ of prohibition is appropriate whenever: (1) the trial court exceeded its personal or subject matter jurisdiction; (2) the trial court abused its discretion to such an extent that it lacked the power to act as it did; or (3) there is no adequate remedy by appeal for the party seeking the writ, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision of the lower court. *Missouri State Board of Registration for the Healing Arts v. Brown,* 121 S.W.3d 234, 236 (Mo. banc 2003). A writ is also appropriate "to prevent unnecessary, inconvenient, and expensive litigation." *Id.* (*quoting State ex rel. Linthicum v. Calvin,* 57 S.W.3d 855, 857 (Mo. banc 2001)).

The Respondent has not entered any document denominated a judgment from which an appeal might be taken. Further, "[t]he court in a judgment debtor's

examination… lacks authority to issue any kind of order or judgment," and "[n]either can one appeal from examination." *State ex rel. Long v. Askren*, 874 S.W.2d 466, 477 (Mo. App. W.D. 1994); *see also Brilliant v. Feinberg*, 7 S.W.3d 20, 22-23 (Mo. App. E.D. 1999) (stating that "[t]he court which hears evidence in a judgment debtor examination proceeding has no power to issue any kind of order or judgment"). The Relators, Mr. and Mrs. Nothum, have no remedy other than prohibition for the threat of further judicial coercion to surrender their federal and state constitutional rights to be free from compulsory self-incrimination and the prospect of suffering further incarceration for relying upon those rights.

Statement of Facts

Arizona Bank and Trust ("the Bank") obtained a judgment against the Relators, Mr. David Nothum and Mrs. Glenette Nothum ("the Nothums"), in an Arizona state court. The Nothums are a married couple. The Bank registered its judgment in several Missouri counties, including St. Louis County. It attempted execution in St. Louis County without success.

The Bank then obtained an Order pursuant to §513.380 R.S.Mo. (2000) and Mo. R. Civ. P. 76.27 directing the Nothums to appear before the Honorable John F. Kintz, the previous Respondent in this case, for examination as judgment debtors. The Order provided that the Nothums were to undergo examination under oath regarding matters touching upon their ability and means to satisfy the judgment.

The examination was called to order initially in the presence of the previous Respondent on July 28, 2010. Counsel for the Bank produced a document styled "Grant of ***Use*** Immunity" (emphasis added) bearing the signature of an assistant St. Louis County Prosecuting Attorney that purported to grant the Nothums ***use*** immunity with specified conditions and limitations. The document provided that the Nothums would not be prosecuted "for any statement made at any judgment debtors examination…when such statement is reasonably related to any question directed to the existence and location of any assets, liabilities, or sources of income." A copy of the "Grant of ***Use*** Immunity" is attached to this petition as Appendix Document B, Page A-2.

Mr. Nothum invoked his right under U.S. Const. amend. V and Mo. Const. art. I, § 19, to refuse to testify against himself. A representation was made by counsel that Mrs.

Nothum would invoke the same right and refuse to answer questions. The previous Respondent promptly issued body attachments and Orders finding that the Nothums were in contempt of court for refusing "to answer Arizona Bank's questions." The previous Respondent directed that the Nothums be jailed in lieu of bond in the amount of $3,117,160.52, the amount in judgment claimed by the Bank.

The Nothums brought their initial petition for writ of prohibition, which preliminary writ was made absolute. *See State ex rel. Nothum v. Kintz*, 333 S.W.3d 512, 513 (Mo. App. E.D. 2011) ("*Nothum I*"). A copy of this opinion is attached hereto as Appendix Document C, Page A-3. There, the Court of Appeals held that the previous Respondent failed to make a finding, as a matter of law, that Mr. Nothum's responses to the questions put to him could not possibly tend to incriminate him, and that Mrs. Nothum, having never been sworn as a witness, could not be held in contempt on the basis of her counsel's representation that she would invoke her constitutional privilege. *Id.* at 56.

After the preliminary writ was made absolute, the Bank conducted a second examination of Mr. and Mrs. Nothum before the Respondent[1] on October 4, 2011. The Bank again presented the same "Grant of Use Immunity" document invoking §513.380 R.S.Mo. (2000). The Respondent held that the "Grant of Use Immunity" protects Mr. and Mrs. Nothum from any offense related to the content of any statement either may

[1] The Honorable John Kintz having retired, the file was re-assigned to the Honorable Joseph L. Walsh III.

make during their judgment debtor examination. In reaching this conclusion, the Respondent determined that the "Grant of ***Use*** Immunity" provided by the Assistant St. Louis County Prosecuting Attorney ***was really a grant of "transactional immunity"*** and furthermore, that the Missouri Legislature, in enacting §513.380.2 R.S.Mo. (2000), intended to provide for the grant of transactional immunity, even though the statute expressly empowers a prosecuting attorney to grant "use immunity" to a judgment debtor. Copies of the Respondent's October 4, 2011 Orders are attached hereto as Appendix Document D, Page A-7 and Appendix Document E, Page A-12.

On October 4, 2011, having been informed of the Respondent's ruling, the Nothums were each duly sworn and invoked their constitutional privilege against self-incrimination in response to all of the Bank's questions. The Respondent then entered its Orders holding the Nothums in contempt, but stayed the Orders thirty (30) days so that the Relators could petition for this writ of prohibition. The Nothums filed their petition with the Court of Appeals, Eastern District, within the time ordered by the Respondent.

Apart from ruling that the "Grant of Use Immunity" afforded constitutionally adequate transactional immunity, the Respondent made no finding that the Nothums' answers to questions that were posed by the Bank's counsel could not possibly tend to incriminate them.

The Court of Appeals issued its Preliminary Writ in Prohibition on November 3, 2011. *State ex. rel. Nothum v. Walsh*, 2012 WL 70576. ("*Nothum II"*). In its Opinion of January 10, 2012, the Court of Appeals stated that it: "would now make [the Preliminary Writ in Prohibition] absolute. However, finding that the issues raised are of

general importance we transfer to the Supreme Court." *Id.* at 2. A copy of this opinion is attached hereto as Appendix Document F, Page A-16.

In *Nothum II*, the Court of Appeals stated that the Respondent's Orders of Contempt do not satisfy the guidelines set forth in *Nothum I*, or *State ex rel. Heidelberg v. Holden*, 98 S.W.3d 116 (Mo. App. S.D. 2003):

> "In Nothum I, we clearly reiterated the standard to be applied when a relator asserts his or her privilege against self-incrimination. Nothum I, 333 S.W.3d at 515. In that instance, a presumption arises that any potential answer will tend to incriminate the relator and, as a result, the trial court must evaluate each question posed and make a finding that the answer to that question "could not possibly have the tendency to incriminate. Nothum I, 333 S.W.3d at 515-16 (citing Heidelberg, 98 S.W.3d at 119-20).

Nothum II, p. 1.

The *Nothum II* Court concluded that the Respondent made no findings that the answer as to each challenged question could not possibly have the tendency to incriminate the judgment debtors. "Without such a finding for each challenged question, it cannot be determined whether the grant of immunity was sufficient to rebut the presumption that the answers might incriminate the Relators." *Id.*

The *Nothum II* Court further held that the trial court erred in its construction of the statutory term "***use immunity***" that is expressly set forth in § 513.380 R.S.Mo. (2000) and in the document signed by the assistant prosecuting attorney. *Nothum II*, p. 2. The

Respondent had held that ***"use immunity"*** as specified by the Legislature does not mean *"**use immunity**"* but instead confers the much broader protection afforded by what is commonly referred to as ***"transactional immunity."*** The *Nothum II* Court found that the statute clearly and unambiguously provides for ***"use immunity"*** only. *Nothum II*, p. 2.

Points Relied On

I.

The Relators Are Entitled To An Order Prohibiting Respondent From Enforcing The Four Challenged Orders Of October 4, 2011, Or Otherwise Attempting To Coerce The Relators To Give Testimony, Because The Relators Have Federal And State Constitutionally Guaranteed Rights To Exercise Their Privilege Against Self-Incrimination, Giving Rise To The Presumption That Any Potential Answer Will Tend To Incriminate The Relators; As A Result The Trial Court Must Evaluate Each Question Posed And Make A Finding That The Answer To That Question "Could Not Possibly Have The Tendency To Incriminate", Which Finding The Trial Court Did Not Make.

Cases

State ex rel. Harry Shapiro Jr. Realty & Investment Co. v. Cloyd, 615 S.W.2d 41 (Mo. 1981)

State ex rel. Munn v. McKelvey, 733 S.W.2d 765 (Mo. banc 1987)

State ex rel. Heidelberg v. Holden, 98 S.W.3d 116 (Mo. App. S.D. 2003)

State ex rel. Nothum v. Kintz, 333 S.W.3d 512 (Mo. App. E.D. 2011)

Statutes and Constitutions

U.S.C.A. Const. Amend. V

Mo. Const. Art. I, Section 19

II.

The Relators Are Entitled To An Order Prohibiting Respondent From Enforcing The Four Challenged Orders Of October 4, 2011, Or Otherwise Attempting To Coerce The Relators To Give Testimony Because The Legislature Has Expressly Limited § 513.380 R.S.Mo. (2000) To "Use" Immunity.

Cases

Kastigar v. United States, 406 U.S. 441 (1972)

State ex rel. Heidelberg v. Holden, 98 S.W.3d 116 (Mo. App. S.D. 2003)

State ex rel. Munn v. McKelvey, 733 S.W.2d 765 (Mo. banc 1987)

United Pharmacal Co. of Missouri, Inc. v. Missouri Board of Pharmacy, 208 S.W.3d 907 (Mo. banc 2006)

Statutes and Constitutions

§136.100 R.S.Mo. (2000)

§144.340 R.S.Mo. (2000)

§386.470 R.S.Mo. (2000)

491.205 R.S.Mo. (2000)

§513.380 R.S.Mo. (2000)

622.390 R.S.Mo. (2000)

U.S.C.A. Const. Amend. V

Mo. Const. Art. I, Section 19

III.

The Relators Are Entitled To An Order Prohibiting The Respondent From Making Any Finding That An Assistant Prosecuting Attorney's Grant Of Immunity For A Judgment Debtor Examination Has Any Legal Effect, Because Assistant Prosecuting Attorneys In Missouri Are Not Authorized to Grant Such Immunity In That § 513.380 R.S.Mo. (200) Grants Only *Prosecuting Or Circuit Attorneys* The Authority To Grant Immunity For Statements Made At Judgment Debtor Examinations.

Cases

State ex rel. Munn v. McKelvey, 733 S.W.2d 765 (Mo. banc 1987)

State v. Elgin, 391 S.W.2d 341 (Mo. 1965)

State v. Lindsey, 182 S.W.2d 530 (Mo. 1944)

State v. Tierney, 584 S.W.2d 618 (Mo. App. W.D. 1979)

Statutes and Constitutions

§513.380 R.S.Mo.

§56.180 R.S.Mo.

Other Authorities

Rule 19.05 Mo. R. Crim. P.

Rule 76.27 Mo. R. Civ. P.

Argument

Point I

The Relators Are Entitled To An Order Prohibiting Respondent From Enforcing The Four Challenged Orders Of October 4, 2011, Or Otherwise Attempting To Coerce The Relators To Give Testimony, Because The Relators Have Federal And State Constitutionally Guaranteed Rights To Exercise Their Privilege Against Self-Incrimination, Giving Rise To The Presumption That Any Potential Answer Will Tend To Incriminate The Relators; As A Result The Trial Court Must Evaluate Each Question Posed And Make A Finding That The Answer To That Question "Could Not Possibly Have The Tendency To Incriminate", Which Finding The Trial Court Did Not Make.

A. The Federal Constitutional Privilege[2]

The federal and state constitutional guarantees of freedom from compulsory self-incrimination are bedrock components of the individual liberty enjoyed by citizens of the United States and the State of Missouri. The protection afforded by U.S. Const. amend. V has always been construed broadly; if anything, the privilege embodied in Mo. Const. art. I, § 19, is even broader than its federal counterpart. No public policy of equal or greater weight supports the supplanting of those constitutional rights in order to assist a private litigant in the collection of a civil debt.

[2] "No person shall …be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

"The privilege against self-incrimination 'registers an important advance in the development of liberty – one of the great landmarks in man's struggle to make himself civilized.'" *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 55 (1964) *(quoting Ullman v. United States,* 350 U.S. 422, 426 (1956). Prohibiting governments from forcing an individual to give testimony against himself "reflects many of our fundamental values and most noble aspirations," including our constitutional regard "for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life." *Id.*

The "one overriding thought" that has driven the privilege is "the respect a government – state or federal – must accord to the dignity and integrity of its citizens." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). "[T]he privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Id.* (*quoting Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

B. Breadth of the State's Constitutional Privilege

This Court has made it clear that the protection afforded by Mo. Const. art. I, § 19, may be construed even more broadly than that provided by U.S. Const. amend. V in order to effect its salutary purpose. In *State ex rel. Harry Shapiro Jr. Realty & Investment Co. v. Cloyd,* 615 S.W.2d 41, 46 (Mo. banc. 1981), this Court acknowledged that it "may neither 'add to nor subtract from the mandates of the United States Constitution.'" *Id.* (*quoting North Carolina v. Butler*, 441 U.S. 369, 376 (1979)). But it declared without equivocation its willingness to find a broader protection under the Missouri Constitution

"in order to assure that the protection given by Article I, § 19…is meaningful." *Id.* More than a century ago, this Court set forth the test for a grant of state immunity offered as a substitute for the constitutional privilege against compulsory self-incrimination:

> No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

Ex parte Carter, 66 S.W. 540, 544 (Mo. 1902).

C. The Trial Court's Order of Contempt Does Not Satisfy the Guidelines Set Forth in *Nothum I* or *State ex rel. Heidelberg v. Holden*

This Court has recognized that "[w]here a witness reasonably apprehends a risk of self-incrimination despite a grant of immunity he may properly invoke the privilege against self-incrimination." *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765, 770 (Mo. banc 1987); *see also Heidelberg*, 98 S.W.3d at 123 (finding relators' refusal to rely on the immunity granted was reasonable because grant was vague and respondent failed to make a finding that relators' answers under compulsion could not possibly have been self-incriminating).

In *Nothum I*, the Court of Appeals reiterated the standard to be applied when a relator asserts his or her privilege against self-incrimination. 333 S.W.2d at 515-16,

citing *Heidelberg*, 98 S.W.3d at 119-20. In that instance, a presumption arises that any potential answer will tend to incriminate the relator, and, as a result, the trial court must evaluate each question posed and, as a matter of law, make a finding that the answer to each question "could not possibly have the tendency to incriminate." *Id., see also, Cloyd, supra*, 615 S.W.2d at 46.

However, both the Transcript of the Nothums' judgment debtor examinations and the Respondent's Orders of October 4, 2011 are silent as to these requisite findings. As a matter of law, the Respondent erred in finding the Nothums in contempt for invoking their privilege against self-incrimination.

Point II

Relators Are Entitled To An Order Prohibiting Respondent From Enforcing The Four Challenged Orders Of October 4, 2011, Or Otherwise Attempting To Coerce The Relators To Give Testimony Because The Legislature Has Expressly Limited § 513.380 R.S.Mo. (2000) To "Use" Immunity.

The United States Supreme Court and Missouri Courts of Appeal have recognized that a ***sufficient*** grant of immunity from prosecution by a state prosecuting attorney may supplant the protection of a constitutional privilege against being compelled to submit to testimonial examination. *See, e.g., Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) (holding that testimony might be compelled after a grant of immunity affording "absolute immunity" against prosecution); *Kastigar v. United States*, 406 U.S. 441, 462 (1972) (holding that the privilege against compulsory self-incrimination may be supplanted by an immunity statute, but only if the grant of immunity is co-extensive with the

constitutional protection); *State ex rel. Heidelberg v. Holden*, 98 S.W.3d 116, 122 (Mo.App. S.D. 2003) (citing *Kastigar* and holding testimony may be compelled when adequate immunity, coextensive with any constitutional privilege, is first afforded the witness).

In *Kastigar*, the United States Supreme Court made it clear that it is "immunity from use *and derivative use*" that can serve as a substitute for the Fifth Amendment privilege:

> Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, [equates to the constitutional protection.] It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

406 U.S. at 453 (emphasis added).

Kastigar arose from contempt judgments entered after individuals who had been granted immunity refused to answer questions before a grand jury. *Id.* at 442-43. The immunity had been issued pursuant to 18 U.S.C. § 6002 and explicitly proscribed the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)." *Id.* The United States Supreme Court found that prohibition equivalent to the constitutional privilege.

The immunity authorized by § 513.380 and purportedly granted in this case is not equivalent to the constitutional privilege as that statute expressly states that it authorizes "use" immunity only. It does not authorize derivative use immunity, or the even broader "transactional immunity" described in *Kastigar*.[3] Its pertinent provisions, styled "**Examination of judgment debtor, when, procedure – grant of *use* immunity**" (emphasis added) state:

> "Any prosecuting attorney or circuit attorney may grant use immunity from prosecution to a judgment debtor for any statement made at a judgment debtor's examination conducted pursuant to subsection 1 of this section. Such use immunity from prosecution shall protect such person from prosecution for any offense related to the content of the statements made."

The statute does not purport to authorize the prosecuting attorney to grant the *Kastigar*-mandated derivative use immunity, that is, immunity from prosecution based upon information derived by prosecutors directly or indirectly from statements made during a judgment debtor examination. Furthermore, the statute specifically states that the immunity granted thereby is "use immunity." Nevertheless, the Respondent

[3] In *Kastigar,* the United States Supreme Court defined "transactional immunity" as "accord[ing] full immunity from prosecution for the offense to which the compelled testimony relates" and "affords the witness considerably broader protection than does the Fifth Amendment privilege." *Id.* at 453.

concluded that the Legislature's use of the phrase "any offense related to the content of the statements made" demonstrates that the Legislature intended to grant not ***use immunity***, but rather "***transactional immunity", which is the broadest available immunity***. *Nothum II* at p. 2. See also Appendix Document D, Page A-7.

It is beyond question that the prosecuting attorney's authority to grant immunity is not inherent, but rather limited under Missouri law, and the decision as to when immunity may be obtained is left to the Legislature. *Munn*, *supra*, 733 S.W.2d at 769. The Respondent's decision to interpret the Legislature's double deployment of the word "use" in §513.380 as an intention on its part to grant "transactional" immunity flies in the face of the first principal of statutory construction, which is to ascertain the intent of the Legislature as expressed in the words of the statute. *United Pharmacal Co. of Missouri, Inc. v. Missouri Board of Pharmacy*, 208 S.W.3d 907, 909 (Mo. banc 2006) (*citing American Healthcare Management, Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999)).

Only when the legislative intent cannot be determined from the plain meaning of the statutory language may rules of construction be applied to resolve ambiguity. *United Pharmacal*, 208 S.W.3d at 910; *see also, e.g. Hardt v. Vitae Foundation, Inc.* 302 S.W.3d 133, 138 (Mo. App. W.D. 2009) ("Where the language of a statute is clear and unambiguous, there is no room for construction.") This goal is achieved by giving the Legislature-chosen language its plain and ordinary meaning. *Id.* at 910. In enacting § 513.380, the Legislature used the phrase "***use immunity***." It did not use the phrase "***derivative use immunity***" or the phrase "***transactional immunity***." It was not

Respondent's role to unilaterally rewrite the law to conform to its perception of how the Legislature should have written it. *Miles v. Lear Corp.*, 259 S.W.3d 64, 68-69 and n. 3 (Mo. App. E.D. 2008).

As the Court of Appeals observed in *Nothum II* at p. 2, the Legislature understands the difference between "use immunity" and the broader "transactional immunity", citing Missouri Revised Statutes (2000) §§ 136.100, 144.340, 386.470, 491.205, and 622.390, and knows how to refer to transactional immunity when it chooses to do so.

In this case, the St. Louis County Prosecuting Attorney was limited by the statute's express grant of "*use*" immunity. Thus, the issuance of the "Grant of Use Immunity" by itself, is clearly inadequate to serve as a substitute for the protections afforded by U.S. Const. amend. V and Mo. Const. art. I, § 19.

Further, neither the purported grant of use immunity in this case nor the statute authorizing use immunity pretends to provide protection against prosecution based on information derived from answers that the Nothums might provide in response to their interrogations as judgment debtors. Given the clarity with which the United States Supreme Court has held that use immunity must include derivative use immunity in order to supplant the constitutional privilege and compel an individual who has invoked that privilege to give testimony, *Kastigar*, 406 U.S. at 453, the inadequacy of the present grant is patent and undeniable.

Point III

Relators Are Entitled To An Order Prohibiting Respondent From Making Any Finding That An Assistant Prosecuting Attorney's Grant Of Immunity For A Judgment Debtor Examination Has Any Legal Effect, Because Assistant Prosecuting Attorneys In Missouri Are Not Authorized to Grant Such Immunity In That § 513.380 R.S.Mo. (200) Grants Only *Prosecuting Or Circuit Attorneys* The Authority To Grant Immunity For Statements Made At Judgment Debtor Examinations.

In *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765 (Mo. banc 1987), this Court discussed at length a prosecuting attorney's authority to grant immunity under Missouri law. This Court considered the issue of "[w]hether the good to be attained by procuring testimony of criminals is greater or less than the evil to be wrought by exempting them forever from prosecution" to be "a question of high policy," and "agree[d with courts in other jurisdictions] that the decision as to when immunity may be obtained is best left to the legislature." *Id.* at 769. This Court referred to giving immunity as a "dangerous practice," and concluded that, since "the immunity power is subject to such abuse, [it] does not inhere to the office of the prosecutor, but rather . . . Missouri prosecutors may obtain the authority to grant immunity only after legislative deliberation and the approval of carefully drawn legislation." *Id.*

In the case of judgment debtor examinations, the Legislature has provided that "[a]ny *prosecuting attorney or circuit attorney* may grant use immunity from prosecution

to a judgment debtor for any statement made at a judgment debtor's examination…." Mo. Rev. Stat. § 513.380(2) (2010) (emphasis added).

The Legislature has also spoken specifically regarding the authority of assistant prosecuting attorneys. Mo. Rev. Stat. § 56.180 (2010) authorizes assistant prosecuting attorneys in "class one" counties (which includes St. Louis County) to "discharge such duties as may be required of them in criminal and civil causes," and goes on to list duties such as "attend[ing] grand jur[ies]," "assisting and advising [grand juries]," and examin[ing] witnesses." That statute also specifically "empower[s]" assistant prosecuting attorneys "to sign in their own name informations in criminal causes." Section 56.180 does not mention, generally or specifically, assistant prosecuting attorneys' authority to grant immunity.

Missouri Rule of Criminal Procedure 19.05 provides that the term "'prosecuting attorney' includes . . . assistant prosecuting attorneys," but limits that definition to apply only to the Rules of Criminal Procedure. *Id.* Judgment debtor examinations are not criminal proceedings, and are specifically provided for in the Missouri Rules of Civil Procedure. Mo. R. Civ. P. 76.27.

The Missouri Rules of Civil Procedure do not contain a provision equating prosecuting attorneys and assistant prosecuting attorneys. Furthermore, in the specific case of judgment debtor examinations, the Legislature only authorizes "[a]ny prosecuting attorney or circuit attorney" to grant "immunity from prosecution to a judgment debtor for any statement made at a judgment debtor's examination . . . ." Mo. Rev. Stat. § 513.380(2) (2010).

Thus, it is not surprising that no appellate court in Missouri has ever held that the power granted to "prosecuting attorney[s]" in § 513.380 extends to assistant prosecuting attorneys by virtue of the "civil causes" language of § 56.180. Indeed, every Missouri Court of Appeals that has cited § 56.180 in support of assistant prosecuting attorney authority, has done so only in the context of either grand jury proceedings or the signing of information and indictments. *State v. Elgin*, 391 S.W.2d 341, 343 (Mo. 1965) (*quoting* the statute and finding that "an indictment should not . . . be held a nullity on the ground it is signed by an assistant prosecuting attorney."); *State v. Lindsey*, 182 S.W.2d 530, 530 (Mo. 1944) (finding that the information signed by an assistant prosecuting attorney "sufficient under our statute."); *State v. Tierney*, 584 S.W.2d 618, 620 (Mo. App. W.D. 1979) (finding that "[t]he signature of the assistant prosecutor on the information brought against the defendant was as if done by the prosecutor."); *State v. Walker*, 110 S.W.2d 780, 782 (Mo. App. 1937) (finding that "[t]he information was properly signed by the assistant prosecuting attorney."); *State v. Easley*, 338 S.W.2d 884, 885-86 (Mo. 1969) (citing the statute and finding that "the information was not invalid" because it was an assistant prosecuting attorney that had signed it).

Given that this Court has stated so unequivocally that the authority to grant immunity can only emanate from a specific legislative grant, § 513.380 cannot fairly be read to extend beyond its clear language which specifies only prosecuting attorneys or circuit attorneys. No appellate court in Missouri has held that the authority to grant immunity is among the many powers given to assistant prosecuting attorneys by virtue of

§ 56.180. Additionally, the Rules of Civil Procedure governing this proceeding noticeably lack any provision that could be construed to grant such power.

This Court should follow the many well considered decisions interpreting § 56.180 and the limited areas to which it has been applied, and thereby find that assistant prosecuting attorneys do not have the authority under § 513.380 to give judgment debtors immunity for statements made at a judgment debtor examination.

Conclusion

Particularly in light of this Court's explicit recognition of the danger of abuse inherent in the power to grant immunity from prosecution, the contempt citation and incarceration employed to coerce the Nothums to rely upon the present and constitutionally inadequate grant of use immunity, and the plain threat that they will be jailed again indefinitely if they persist in refusing to testify against themselves, should be put to rest.

Relators David M. Nothum and Glenette Nothum request the following relief:

(1) That this Court find that the Respondent exceeded his jurisdiction when he found each of the Relators in contempt of court and ordered each incarcerated until his or her contempt was purged because the Respondent failed to find that the Relators' answers to each of the Bank's questions could not possibly have the tendency to incriminate them;

(2) That this Court find that the grant of use immunity purportedly granted in this case was ineffective to supplant the Nothums' federal and state constitutional rights to refuse to give testimony against themselves, both because: (a) in connection with judgment debtor examinations, the Legislature has invested only the prosecuting attorneys of Missouri with authority to grant use immunity and not derivative use or transactional immunity; and (b) the purported grant in this case was not made by the elected St. Louis County Prosecuting Attorney;

(3) That this Court find that the Respondent was without jurisdiction to order either Relator to give testimony in response to the questions of the Bank pertaining to their

income and assets after each Relator had invoked his or her rights to refuse to give testimony against himself or herself since the "Grant of Use Immunity" provided to them was insufficient to supplant their constitutional rights against self-incrimination;

(4) That the Court issue its permanent writ of prohibition thereby enjoining the Respondent from taking further action to require either Relator to give such testimony, or to punish either Relator for refusing to give such testimony; and

(5) That the Court issue its Order directing the Respondent to vacate his findings that each Relator committed civil contempt by refusing to give such testimony and finding that neither of the Relators are guilty of contempt, and to dismiss the contempt proceeding.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; and (2) contains 6,079 words, including the sections exempted by Rule 84.06(b)(2), based on the word count that is part of Microsoft Word 2010.

/s/ Kathryn M. Koch

Kathryn M. Koch

Certificate of Service

I certify that this brief, as required by Missouri Supreme Court Rule 103.08, was served on counsel and Respondent identified below by the electronic filing system, or U.S. Mail, postage paid, on February 17, 2012, as indicated:

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